Supreme Court, U.S.
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No. 94-1746

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DR. JOSEPH C. DEBLASE and BEN CERRA,

Petitioners,

v.

CIGNA INDIVIDUAL FINANCIAL SERVICES COMPANY, CIGNA CORPORATION, CIGNA SECURITIES, INC., NICHOLAS DISETTE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should grant *certiorari* in this diversity action to review a decision of the United States Court of Appeals for the Eighth Circuit, affirming the District Court's grant of summary judgment for respondents on petitioners' Missouri common law and statutory claims which was based upon established principles of Missouri law.

2. Whether the Court of Appeals erred in affirming summary judgment for respondents on petitioners' state law claims where the petitioners claim that they believed they were purchasing safe and conservative investments, but the undisputed facts establish that the purchase agreements which petitioners signed, and the offering memoranda which petitioners acknowledged they received, disclosed that the investments were speculative and high-risk.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to this case in the United States Court of Appeals for the Eighth Circuit, *DeBlase v. CIGNA Individual Financial Services Co.*, No. 94-2250WMKC, were Joseph C. DeBlase and Ben Cerra, as plaintiffs-appellants, and CIGNA Individual Financial Services Co. ("CIFSCO"), CIGNA Securities, Inc. ("CSI"), and Nicholas DiSette, as defendants-appellees. Although named as a defendant in the action below, CIGNA Corporation was never served with a copy of the Amended Complaint and took no part in the proceedings. Accordingly, CIGNA Corporation is not a proper respondent to the petition.

RULE 29.1 LISTING

Subsequent to the filing of this litigation, CSI and CIFSCO merged to form CIGNA Financial Advisors, Inc., a wholly-owned subsidiary of Connecticut General Corporation, whose ultimate corporate parent is CIGNA Corporation.

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In The
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DR. JOSEPH C. DEBLASE and BEN CERRA,

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v.

CIGNA INDIVIDUAL FINANCIAL SERVICES COMPANY, CIGNA CORPORATION, CIGNA SECURITIES, INC., NICHOLAS DISETTE,

Respondents.

On Petition For A Writ Of Certiorari To The
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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The decisions of the United States Court of Appeals for the Eighth Circuit and the United States District Court for the Western District of Missouri are not reported. Copies of these decisions are attached to the petition as Appendices A through F.

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

Relevant Missouri statutory and constitutional provisions are set forth in Appendix E hereto.

STATEMENT OF THE CASE

In 1985-86, petitioners Joseph C. DeBlase and Ben Cerra (plaintiffs below) purchased interests in several tax-advantaged real estate and equipment leasing limited partnerships through respondent CSI. It is undisputed that prior to each purchase petitioners signed subscription agreements which plainly advised them that the partnership interests they were buying were "speculative," "high risk" investments whose financial benefits and ultimate success were inherently uncertain. In those same agreements, petitioners acknowledged in writing that they understood "the investments carried a high risk" and, further, that they had "received and read or reviewed" the private placement memoranda ("PPMs") for the investments. (Pet. App. C, A-11.)[1/] The PPMs contained exhaustive warnings and disclosures about the risks associated with the investments. For example, the PPMs "often began with capitalized, bold-faced warnings such as: **THE INVESTMENT INVOLVES A HIGH DEGREE OF RISK**." (*Id.* at A-9.) Thus, the documents that petitioners signed and acknowledged they received "unequivocally stated the inherent risk of the investments." (*Id.* at A-11.)

[1/] "Pet. App." refers to the appendix to the petition. "App." refers to the appendix to the brief in opposition to the petition. "Pet." refers to the petition for a writ of *certiorari*.

In 1991, following a decline in real estate markets nationwide, petitioners sued respondents in Missouri state court, asserting claims for common law fraud, breach of fiduciary duty, negligence, negligent supervision, and violation of the Missouri Merchandising Practices Act, R.S. Mo. § 407.020 *et seq.* Each claim was premised upon the allegation that respondents failed to disclose the risks inherent in petitioners' investments. Respondents removed the action to the United States District Court for the Western District of Missouri pursuant to 28 U.S.C. § 1332.

After full discovery, respondents moved for summary judgment on all five counts. On May 25, 1993, the District Court granted respondents' motion, holding that petitioners' claims failed as a matter of clearly established Missouri law because petitioners "had notice of the speculative nature of the investments" by virtue of the written risk disclosures in their signed subscription agreements and in the PPMs. (App. A-5.) As the District Court held, because petitioners signed documents disclosing the risks of their investments and acknowledging that they had received the PPMs, under Missouri law, they were bound by their signed acknowledgements. (*Id.* at A-6.) On May 27, 1993, the District Court issued an Amended Order which specified that judgment was entered for respondents on all claims. (Pet. App. C, A-15 to A-16.)

Following petitioners' motion for reconsideration, the District Court issued a Second Amended Order on November 17, 1993. The District Court affirmed the prior entry of summary judgment on petitioners' common law and statutory fraud claims, but vacated the entry of summary judgment on petitioners' negligence and breach of fiduciary duty claims. (App. B-1.) However, the court invited respondents to renew their motion with respect to those claims. (*Id.*)

Respondents filed a Renewed Motion for Summary Judgment, which addressed the claims for negligence and breach of fiduciary duty. On March 29, 1994, the District Court entered summary judgment for respondents on those claims. (Pet. App. E.) The Court held that petitioners' negligence claims rested upon

alleged oral misrepresentations and, in the face of the comprehensive written disclosures petitioners acknowledged they had received, petitioners could not establish justifiable reliance upon those misrepresentations. (*Id.* at A-24.) With respect to the breach of fiduciary duty claim, the Court held that petitioners had failed to show that respondents breached any duty owed to them under Missouri law. (*Id.* at A-23, A-25.) Petitioners' motion for reconsideration was denied by the District Court on April 21, 1994. (App. C.)

Petitioners appealed the District Court's orders granting summary judgment to the United States Court of Appeals for the Eighth Circuit. On November 22, 1994, the Court of Appeals affirmed the District Court. (Pet. App. A.) Petitioners filed a petition for rehearing and suggestion of rehearing *en banc*, which was denied on January 19, 1995. (Pet. App. B.) This petition followed.

REASONS FOR DENYING THE WRIT

This Court will grant a writ of certiorari "only when there are special and important reasons therefor." Sup. Ct. Rule 10. Petitioners offer essentially two purported grounds for review, neither of which warrant consideration by this Court. *First*, petitioners claim that the Eighth Circuit should have deferred its ruling to await a decision by the Missouri Supreme Court in a case which the Missouri Supreme Court dismissed before decision. *Second*, petitioners claim that the District Court and the Eighth Circuit erred in granting and affirming summary judgment for respondents. Neither of these grounds presents a "special and important" issue worthy of this Court's attention. Petitioners' first argument is moot. As to petitioners' second argument, the purported errors of which petitioners complain involve purely state law issues not appropriate for *certiorari* review and, in any event, were correctly decided under established principles of Missouri law. Accordingly, the petition for a writ of *certiorari* should be denied.

I.

PETITIONERS' RELIANCE ON THE MISSOURI STATE COURT CASE OF *COCHRAN v. GIDDENS* IS MISPLACED BECAUSE THAT CASE HAS BEEN DISMISSED WITHOUT OPINION.

Petitioners rely on a memorandum opinion issued by the Missouri Court of Appeals in *Cochran v. Giddens*, 1994 WL 160351 (Mo. App. May 3, 1994). According to petitioners, the decisions granting and affirming summary judgment for respondents in this case conflict with the *Cochran* "decision." (Pet. 11.) Petitioners further contend that because the Missouri Court of Appeals transferred the *Cochran* case to the Missouri Supreme Court for decision, the Eighth Circuit was required to stay its ruling pending that decision. Petitioners are wrong.

The Missouri Court of Appeals never decided *Cochran v. Giddens*. That court only issued a memorandum opinion indicating how it "would" have decided the case, and instead transferred the case to the Missouri Supreme Court for ultimate decision. 1994 WL 100351 at *4.[2/] The Missouri Supreme Court dismissed the case on March 29, 1995 without issuing an opinion. (App. D.)

Even if the Missouri Court of Appeals had actually decided the case, its opinion was vacated when the matter was transferred to the Missouri Supreme Court. *See State v. Norman*, 380 S.W.2d 406, 407 (Mo. *en banc* 1964) ("By reason of the order transferring the cause to this Court, the opinion and decision of the St. Louis Court of Appeals was necessarily vacated and set aside and may be referred to as functus officio"). *See also* Mo. Const. Art. V, Sec. 10 ("The supreme court may finally determine all causes coming to it from the court of appeals, . . . the same as an

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[2/] The Court of Appeals' memorandum in *Cochran*, which was fully discussed in both petitioners' and respondents' briefs filed in the Eighth Circuit, raised an entirely different issue than that raised here. It was concerned only with the question of when plaintiffs had notice of an alleged fraud for purposes of applying the Missouri statute of limitations; it did not address the issue of reliance.

original appeal"); Mo. S. Ct. Rule 83.09 (same); *Philmon v. Baum*, 865 S.W.2d 771, 774 (Mo. App. 1993); *Carroll v. Loy-Lange Box Co.*, 829 S.W.2d 86, 90 (Mo. App. 1992). Thus, even if the Missouri Court of Appeals had decided *Cochran*, that court's opinion was vacated and "of no precedential effect." *Carroll*, 829 S.W.2d at 90.

Accordingly, there is no state court opinion in *Cochran*, and neither the orders of the District Court nor the *per curiam* opinion of the Eighth Circuit conflicts with any Missouri state court decision. Petitioner's reliance on *Cochran* is thus misplaced and provides no basis for review by this Court.[3/]

II.

PETITIONERS' CONTENTION THAT THE COURT OF APPEALS ERRED IN AFFIRMING SUMMARY JUDGMENT FOR RESPONDENTS DOES NOT MERIT THIS COURT'S REVIEW.

Petitioners' remaining arguments are, in effect, a litany of complaints that the District Court and the Court of Appeals erred when they granted and affirmed summary judgment for respondents. Specifically, petitioners complain that the lower courts erred in deciding that petitioners were bound by the risk disclosures in their signed subscription agreements and by their written acknowledgements that they had received and reviewed the PPMs, and thereby had knowledge of the high risk nature of the investments. (Pet. 9-15.) Petitioners also complain that the lower courts erred in ruling that petitioners failed to show that respondents

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[3/] Pursuant to Supreme Court Rule 15.1, respondents advise the Court that petitioners' discussion of the status and legal effect of *Cochran v. Giddens* is inaccurate. The true status and effect of the *Cochran* case is as set forth above. In addition, the petition contains numerous other misstatements of fact and law. Because those misstatements do not alter the conclusion that petitioners do not and cannot establish a basis for review by this Court, respondents have not identified each individual misstatement, but instead have accurately set forth the dispositive, undisputed facts and the applicable law in this brief in opposition.

breached any of the limited duties owed to petitioners. (Pet. 16-22.)

Mere error by the court below normally does not provide a sufficient basis for granting a petition for writ of *certiorari*. *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review"). The petition presents no issue of federal law, no conflict among the circuits, nor any other question whose resolution by this Court would provide needed guidance to courts throughout the nation. The purported errors described by petitioners are of consequence to no one but petitioners. Therefore, they do not merit this Court's attention.

In any event, there was no error. All of petitioners' arguments received full consideration by the courts below, which correctly decided that summary judgment was appropriate for respondents. Under Missouri law, petitioners are charged as a matter of law with knowledge of the contents of documents that they signed. *See Mercantile Trust Co. v. Carp*, 648 S.W.2d 920, 924 (Mo. App. 1983) (person who signs a document is bound by its contents, whether he reads it or not); *United States use of Bussen Quarries, Inc. v. Thomas*, 938 F.2d 831, 833 (8th Cir. 1991) (same). Here, petitioners signed subscription agreements "that clearly indicated the high risk associated with the investments" (Pet. App. C, at A-8 n.8), and therefore had knowledge of the risks involved in the investments before they made their investments. Because petitioners knew the risks, they could not justifiably rely on any alleged contrary oral statements by respondents. *Davidson v. Wilson*, 973 F.2d 1391, 1401 (8th Cir. 1992) (affirming summary judgment for defendant because plaintiffs "may not

justifiably close their eyes to the written materials and rely only upon the oral statements").[4/] Consequently, all of petitioners' claims based upon allegations of fraud or negligence were correctly dismissed.

For the same reasons, petitioners failed to show that respondents breached any duty owed to petitioners under Missouri law. Missouri imposes, at most, only limited duties on brokers who lack discretionary authority over a client's investments. *Vogel v. A.G. Edwards & Sons, Inc.*, 801 S.W.2d 746, 752 (Mo. App. 1990). Because the written offering and subscription materials fully disclosed all of the information petitioners claimed was concealed, the District Court correctly held that petitioners could not show that respondents breached any of the duties imposed by *Vogel*, and therefore could not establish claims for breach of fiduciary duty or negligence.

Because petitioners present no "special and important" basis for granting *certiorari*, the petition should be denied.

[4/] The federal courts of appeals that have addressed these issues uniformly have concluded that investors are bound by written risk disclosures contained in offering materials. *See, e.g., Kennedy v. Josephthal & Co.*, 814 F.2d 798, 802-03 (1st Cir. 1987); *Brown v. E.F. Hutton Group*, 991 F.2d 1020, 1033 (2d Cir. 1993); *Foremost Guaranty Corp. v. Meritor Savings Bank*, 910 F.2d 118, 126 (4th Cir. 1990); *Platsis v. E.F. Hutton & Co.*, 829 F.2d 13 (6th Cir. 1987), *cert. denied*, 485 U.S. 962 (1988); *Acme Propane, Inc. v. Tenexco, Inc.*, 844 F.2d 1317, 1322 (7th Cir. 1988); *McGonigle v. Combs*, 968 F.2d 810, 816-17 (9th Cir.), *cert. dism.*, 113 S. Ct. 399 (1992); *Zobrist v. Coal-X, Inc.*, 708 F.2d 1511, 1518 (10th Cir. 1983).

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Dr. Joseph C. DeBlase and Ben Cerra,	)	
Plaintiffs,	)	
vs.	)	No. 91-0642-CV-W-2
Cigna Individual Financial Services, *et al.*,	)	
Defendants.	)	

ORDER

I. Introduction

Pending before the court is defendants' motion for summary judgment. Plaintiffs are seeking to recover funds lost in various investments orchestrated by defendant, DiSette, who was allegedly acting within his capacity as an employee of the other three defendants (known collectively herein as Cigna).[1/] Plaintiffs filed this action in state court and defendants subsequently removed to federal court. On January 29, 1993, plaintiffs filed an Amended Complaint which states five counts: Count One alleges that DiSette, acting as an employee of Cigna, made fraudulent representations to plaintiffs concerning investments; Count Two alleges that DiSette, acting as an employee of Cigna, violated his fiduciary duty to plaintiffs; Count Three alleges as an alternative to Counts One and Two, that DiSette, acting as an employee of Cigna, acted negligently towards plaintiffs; Count Four alleges that Cigna was negligent in hiring and supervising DiSette; and Count Five alleges

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[1/] The other named defendants are Cigna Individual Financial Services Company, Cigna Corporation and Cigna Securities.

that defendants' actions were unlawful under the Missouri Merchandising Practices Act, specifically Mo. Rev. Stat. § 407.020.1 (1986). Plaintiff also seeks punitive damages in Counts One, Two and Five.

Defendants move for summary judgment arguing that: (1) Plaintiff DeBlase's action is precluded (for the most part) by the controlling statute of limitations; and (2) Written disclosures to the plaintiffs negate all claims flowing from alleged oral representations made by DiSette to plaintiffs.

II. Standards Governing Summary Judgment

A movant is entitled to summary judgment pursuant to Fed. R. Civ. P. 56(c), "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

The moving party bears the burden of proof. *Aetna Life Ins. Co. v. Great National Corp.*, 818 F.2d 19, 20 (8th Cir. 1987). When considering a motion for summary judgment, the court must scrutinize the evidence in the light most favorable to the non-moving party, according the non-moving party the benefit of every factual inference and resolving all doubts as to the facts or existence of any material fact against the moving party. *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 179-80 (W.D. Mo. 1985).

Recently, the Supreme Court has redefined the standards to be considered in ruling on summary judgment motions. Where, as in this case, the party moving for summary judgment does not bear the ultimate burden of persuasion at trial that party must take a prima facie showing "that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). This burden is met when the moving party identifies those portions of the record demonstrating an absence of a genuine issue of material fact. *Id.* at 323.

If the moving party meets this requirement, the burden shifts to the non-moving party who must produce sufficient evidence to manifest a dispute as to the material facts. To successfully meet this burden the party opposing summary judgment "must do more

than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, the party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 474 U.S. 242, 248 (1986). Finally, "[i]n assessing whether a material fact is subject to a genuine dispute, a court should employ a standard essentially identical to that governing a motion for directed verdict under Rule 50(a)." *Id.* at 250. If a rational trier-of-fact, considering the record as a whole, could not find in favor of the non-moving party, then a trial is unnecessary. *Matsushita*, 475 U.S. at 586.

III. Analysis

Defendants attack plaintiffs' claims on two fronts. First, defendants contend that all of plaintiff DeBlase's claims arising out of investments made before 1986 (eight of the ten investments made by DeBlase) are time-barred by Mo. Rev. Stat. § 516.120 (1986) (five year statute of limitations triggered by notice of alleged fraud). Second, defendants attack the allegation underlying all of the plaintiffs' claims arguing that no fraud or misrepresentation exists as a matter of law.[2/] Both of defendants' arguments turn on the issue of notice. The answer to a single question will ultimately decide both prongs of defendants' motion: When were plaintiffs put on notice that the investments were not low-risk, stable investments but were volatile and speculative in nature?[3/]

[2/] The primary allegation undergirding plaintiffs' claims is that the defendants, through DiSette, made material and fraudulent oral representations concerning the degree of risk and stability of the investments made by plaintiffs. All claims are inherently linked to this allegation. Therefore, defendants seek to invalidate all of plaintiffs' claims by challenging this primary allegation.

[3/] The answer to this question will resolve the issues presented by both prongs of defendants' motion. The point in time that DeBlase was given notice of the true nature of the investments will mark the beginning of the statute of limitations period. Further, if notice of the high risk nature of the investments preceded, or was contemporaneous with, the investments, plaintiffs' misrepresentation claims must fail as a matter of law.

Defendants contend that the "offering materials"[4] provided to plaintiffs (prior to, or at the time of, investment) clearly and unequivocally gave plaintiffs notice that the investments were high risk and not stable. Plaintiffs argue that, at a minimum, there is a genuine dispute of fact concerning when they received notice of the investment's risks.

There is no dispute that plaintiffs signed subscription agreements contemporaneously with each investment. Defendants contend that these subscription agreements provided the critical notice to plaintiffs in two respects. First, in most cases the express terms of the agreements themselves stated that the investments were high risk.[5] Second, the subscription agreements, in one form or another, provided that plaintiffs had "received and read or reviewed" each PPM (detailing the high risk nature of the investments) accompanying the individual investments. The PPMs leave no doubt as to the high risk, speculative nature of the limited partnership investments.[6] Indeed, the PPMs often began with capitalized, bold-faced warnings such as: THE INVESTMENT INVOLVES A HIGH DEGREE OF RISK. Further, throughout the

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[4] Defendants define the "offering materials" as written disclosures provided to plaintiffs including an investor questionnaire, a subscription agreement and a private placement memorandum (a document similar to a prospectus, referred to hereafter as a "PPM").

[5] The following subscription agreements (attached as exhibits to Defendants' Suggestions in Support of the Motion for Summary Judgment) signed by DeBlase clearly indicated the high risk associated with the investments: Exhibit F-1, p. D-3 ¶ 4(k)(i); Exhibit F-2, p. D-3 ¶ 4(k)(i); Exhibit F-3, p. C-3 ¶ 4(k)(i); Exhibit F-4, p. D-3 ¶ 4(k)(i); Exhibit F-5, p. C-3 ¶ 5(l)(i); Exhibit F-7, p. E-2 ¶ 3(l)(i); Exhibit F-9, p. B-5 ¶¶ 4(j) & 4(l); and Exhibit F-10, p. IV-6 ¶¶ 8 & 20. Those signed by Cerra stating the risks involved are: Exhibit G-1, p. B-5 ¶¶ 4(j) & 4(l); Exhibit G-2, p. IV-6 ¶¶ 8 & 20; and Exhibit G-4, p. 3 ¶ 3(b).

[6] The PPMs associated with the DeBlase investments repeatedly indicated the high risk involved with these investments. *See* Exhibit F-1, pp. (ii) & 32; Exhibit F-2, pp. (ii) & 30; Exhibit F-3, p. (iii); Exhibit F-4, p. (ii); Exhibit F-5, pp. (iv-v) & 45; Exhibit F-6, pp. (i) & 19; Exhibit F-7, pp. (i) & 26; Exhibit F-8, pp. (i) & 27; Exhibit F-9, pp. v & 45; and Exhibit F-10, cover page and pp. (i) & 49. The PPMs associated with Cerra's investments also clearly stated the risks involved. *See* Exhibit G-1, pp. v & 45; Exhibit G-2, cover page and pp. (i) & 49; Exhibit G-3, pp. (i) & 27; Exhibit G-4, pp. (i) & 18; and Exhibit G-5, pp. (ii) & 48-49.

text of the various PPMs the speculative nature of the investments was clearly and redundantly manifested.

To grant summary judgment in favor of defendants, the court must ultimately find that the *only* conclusion that a rational trier-of-fact could reach is that plaintiffs had notice of the speculative nature of the investments prior to, or at the time of, investment (or in the case of DeBlase, beyond the statute of limitations). *See generally Matsushita*, 475 U.S. at 586. The linchpin of defendants' motion is the claim that the signed subscription agreements establish, as a matter of law, that plaintiffs invested money with full notice of the true nature of the investments. With full disclosure to plaintiffs of the risks involved in these investments, defendants argue that plaintiffs' claims of misrepresentation and fraud must fail as a matter of law. The court agrees and will grant the motion for summary judgment accordingly.

Plaintiffs' defense to the motion is that they signed the subscription agreements without reading the offering materials and that DiSette "went to great lengths to conceal material information from the plaintiffs." Plaintiffs' Suggestions in Opposition to the Motion for Summary Judgment, p. 15. That is, DiSette allegedly assured plaintiffs that they did not need to read the offering materials and thereby deceitfully deprived them of the knowledge contained in the written disclosures. "[B]oth plaintiffs have testified that they often time were not even given an opportunity to read the entire document, and [were] simply presented with a stack of documents with post-it notes indicating where they should sign. DeBlase even testified that there were occasions when the *only* page he received of the multi-page documents was the one which he was to sign." Plaintiffs' Suggestions in Opposition to the Motion for Summary Judgment, p. 14 (emphasis in original). The court rejects plaintiffs' argument.

The subscription agreements and the PPMs unequivocally stated the inherent risk of the investments. Plaintiffs had full knowledge of the existence of all these documents (they signed the subscription agreements and the agreements clearly referenced the PPMs) and simply chose not to review them. There has been no evidence that DiSette refused to produce these documents upon request, prevented plaintiffs from examining these documents or

otherwise concealed their existence. Instead, plaintiffs seem to infer that DiSette's alleged assurances that plaintiffs need not review these documents somehow prevented them from examining the documents. The court cannot agree. Knowing that these documents existed, plaintiffs made a conscious choice not to bother themselves with the specific information available to them. Rather, plaintiffs signed the subscription agreements without review and now claim that their reliance on the alleged oral assurances of DiSette should insulate them from the disclosures made in the agreements. This position is untenable.

"Under Missouri law, a person who has an opportunity to read a document but signs it without doing so is held to have knowledge of the document's contents, absent a showing of fraud." *United States of America for the use of Bussen Quarries, Inc. v. Thomas*, 938 F.2d 831, 833 (8th Cir. 1991). Plaintiffs have failed to make any showing that fraud prevented them from understanding what the subscription agreements clearly stated; specifically, that the investments carried a high risk and that plaintiffs had "received and read or reviewed" the PPMs. The *Bussen Quarries* presumption is not invalidated simply because some kind of alleged fraud either created a misapprehension as to the meaning or effect of the signed agreement, or induced plaintiffs to sign. The fraud alleged by plaintiffs does not affect the validity of the signed subscription agreements and therefore plaintiffs are deemed to have full knowledge of the subscription agreements and PPMs.[2/]

Further, this court finds the Eighth Circuit's decision in *Davidson v. Wilson*, 973 F.2d 1391 (8th Cir. 1992), dispositive of

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[2/] Plaintiffs seem to argue two related manifestations of the alleged fraud: (1) That plaintiffs should rely totally on DiSette without reading the offering materials; and (2) The original statements of DiSette concerning the low-risk nature and stability of the investments. The court finds that plaintiffs have not set forth specific facts showing that DiSette represented that the investments were stable and low risk. However, even assuming that these representations did occur does not allow plaintiff to overcome the *Bussen Quarries* presumption. Fraud as to the speculative nature of the investments did not prevent DeBlase from understanding the content or effect of the subscription agreements, nor did it fraudulently induce plaintiffs to sign. Further, while DiSette's alleged assurances to plaintiffs may have been poor counsel, it does not rise to the level of fraud. Accordingly, the court finds that plaintiff have failed to show any possible fraud foreclosing the *Bussen Quarries* presumption.

plaintiffs' argument. In *Davidson*, the court was faced with two investors suing the agent, and the securities company employing the agent, that sold them shares in a high risk limited partnership. *Id.* at 1392. The plaintiffs alleged fraud because the investments did not meet alleged oral representations made by defendants. *Id.* However, the plaintiffs received and signed subscription agreements prior to making the investments. *Id.* at 1399. These agreements made clear the risky nature of the investments and also referenced other documents disclosing the risks involved. *Id.* at 1396-1400.

The district court granted defendants' motion for summary judgment, holding that the plaintiffs "may not justifiably close their eyes to the written materials and rely only upon the oral statements, and that [plaintiffs] accordingly are charged with constructive knowledge of the written materials available to them." *Id.* at 1398. The Eighth Circuit affirmed, finding that:

> a sophisticated investor, confronted with a written document which contained repeated references to two other documents . . . and that also contained explicit disclaimers . . . did not justifiably rely upon any contradictory oral representations. There was ample reason for [plaintiffs] to take the position, that they would not move ahead and make investment payments until such references and representations were clarified to their satisfaction. Thus, we agree with the district court that, based upon the facts of this case, [plaintiffs'] claimed reliance upon [defendant's] oral representations was unjustifiable as a matter of law.

Id. at 1401.

The factual and legal similarities between this action and *Davidson* compel an identical result. Admittedly, plaintiffs DeBlase and Cerra are not as financially sophisticated as the investors in *Davidson*, but neither are they unsophisticated.[8/] Plaintiff DeBlase is highly educated with significant experience in investing and

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[8/] Plaintiffs have set forth considerable facts in an effort to establish their financial unsophistication. However, the significance of sophistication is muted by the patent and unequivocal risk disclosures in the subscription agreements and PPMs. The court finds that no great degree of sophistication was needed to be aware of the speculative nature of plaintiffs' investments.

financial matters. Deposition of Joseph DeBlase, pp. 33-34, 47, 48, 56, 64, 66, 68 & 72-73. Plaintiff Cerra has owned and operated two successful construction corporations for a number of years.[9/] Deposition of Ben Cerra, p. 10-13. Armed with a reasonable degree of business sophistication, plaintiffs were confronted with subscription agreements containing explicit disclaimers as to risk and/or referencing additional risk-disclosing documents. Plaintiffs made a knowing and intelligent waiver of their right to review these materials before investing and relied blindly on the alleged oral representations of DiSette. Given these facts, the court must find that plaintiffs' "claimed reliance upon [defendant's] oral representations was unjustifiable as a matter of law." *Id.* at 1401.[10/]

[9/] Plaintiff Cerra also indicated on one subscription agreement that "I have such knowledge and experience in financial and business matters and in tax-oriented investments in particular that I am capable of evaluating the merits and risks of an investments in the securities." Defendants' Suggestions in Support of the Motion for Summary Judgment, Exhibit G-5, p. A-1-7.

[10/] The court in *Davidson* reviewed the plaintiffs' claim of justifiable reliance within the analytical framework set forth in *Zobrist v. Coal-X, Inc.*, 708 F.2d 1511 (10th Cir. 1983). In reviewing claims of justifiable reliance, the relevant factors are:

> (1) the sophistication and expertise of the plaintiff in financial and securities matters; (2) the existence of long standing business or personal relationships; (3) access to the relevant information; (4) the existence of a fiduciary relationship; (5) concealment of the fraud; (6) the opportunity to detect the fraud; (7) whether the plaintiff initiated the stock transaction or sought to expedite the transaction; and (8) the generality or specificity of the misrepresentations.

Davidson, 973 F.2d at 1400 (quoting *Zobrist*, 708 F.2d at 1516). In addition to finding plaintiffs reasonably sophisticated in financial matters, this court finds the other factors weigh heavily in favor of granting the motion for summary judgment. Most significantly, the court finds that plaintiffs had full access to the relevant information (although they chose to ignore the materials); it cannot reasonably be found that DiSette concealed this information; and plaintiffs had every opportunity to detect the alleged fraud by simply reading the documents they signed and/or represented that they had reviewed. Further, while DeBlase offers some evidence of a personal relationship with DiSette, neither plaintiff sets forth facts establishing a fiduciary relationship. Under Missouri law, a confidential or fiduciary

(continued...)

IV. Conclusion

As a matter of law, plaintiffs cannot justifiably rely on the alleged oral representations of Disette. Rather, pursuant to the *Bussen Quarries* presumption and the holding in *Davidson v. Wilson*, the plaintiffs had actual (or at a minimum constructive knowledge) of the high risk, speculative nature of the limited partnerships at the time of investment. It follows then that both prongs of defendants' motion for summary judgment are valid. *See supra* note 3 & accompanying text. Accordingly, it is ORDERED that defendants' motion for summary judgment is GRANTED.

Fernando J. Gaitan, Jr.
United States District Judge

Dated: May 25, 1993
Kansas City, Missouri

10/ (...continued)
relationship exists where one party, through ignorance (such as ignorance concerning finance and investments), "has become subservient to the dominant will of another, that the property of the subservient person has come into the possession or management of the dominant person, that the subservient person has surrendered his independence, and that there has been manipulation of the actions of the subservient party who has placed has trust and confidence in the dominant person." *Neal v. Sparks*, 773 S.W.2d 481, 486 (Mo. Ct. App. 1989). No facts offered by plaintiffs would support a finding that they had surrendered their independence to DiSette.

In weighing all of the *Zobrist* factors applied in *Davidson*, this court finds that plaintiffs are not, as a matter of law, entitled to the protections of justifiable reliance.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Dr. Joseph C. DeBlase and Ben Cerra,	)	
Plaintiffs,	)	
vs.	)	No. 91-0642-CV-W-2
Cigna Individual Financial Services, *et al.*,	)	
Defendants.	)	

SECOND AMENDED ORDER

On May 27, 1993 this court issued an order granting defendants' motion for summary judgment as to all counts of plaintiffs' claim. On June 9, 1993 plaintiffs filed a motion for reconsideration of the May 27 Order and a motion for leave to file suggestions exceeding fifteen pages in support of their motion for reconsideration. Upon a showing of good cause and there being no opposition by the defendant, plaintiff's motion to file suggestions exceeding fifteen pages is granted.

In deciding plaintiff's motion for reconsideration of the summary judgment Order of May 27, 1993, the court finds that defendants' motion for summary judgment, although directed at all of plaintiffs' claims, centered on the issue of reasonable reliance with regards to the fraud claims in Count I and V of plaintiffs' complaint. Defendants did not, however, set forth sufficient arguments with regards to the claims in Counts II through IV to warrant granting summary judgment.

Consequently, the May 27, 1993 Order for summary judgment is rescinded as to Counts II through IV. If defendants wish to renew their motion for summary judgment on these counts

they must file a motion which addresses these claims specifically. The Order of May 27, 1993 is amended as follows.

I. Introduction

Plaintiffs are seeking to recover funds lost in various investments orchestrated by defendant, DiSette, who was allegedly acting within his capacity as an employee of the other three defendants (known collectively herein as Cigna).[1/] Plaintiffs filed this action in state court and defendants subsequently removed to federal court. On January 29, 1993, plaintiffs filed an Amended Complaint which states five counts: Count One alleges that DiSette, acting as an employee of Cigna, made fraudulent representations to plaintiffs concerning investments; Count Two alleges that DiSette, acting as an employee of Cigna, violated his fiduciary duty to plaintiffs; Count Three alleges as an alternative to Counts One and Two, that DiSette, acting as an employee of Cigna, acted negligently towards plaintiffs; Count Four alleges that Cigna was negligent in hiring and supervising DiSette; and Count Five alleges that defendants' actions were unlawful under the Missouri Merchandising Practices Act, specifically Mo. Rev. Stat. § 407.020.1 (1986). Plaintiff also seeks punitive damages in Counts One, Two and Five.

Defendants move for summary judgment arguing that: (1) Plaintiff DeBlase's action is precluded (for the most part) by the controlling statute of limitations; and (2) Written disclosures to the plaintiffs negate all claims flowing from alleged oral representations made by DiSette to plaintiffs.

II. Standards Governing Summary Judgment

A movant is entitled to summary judgment pursuant to Fed. R. Civ. P. 56(c), "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

1/ The other named defendants are Cigna Individual Financial Services Company, Cigna Corporation and Cigna Securities.

The moving party bears the burden of proof. *Aetna Life Ins. Co. v. Great National Corp.*, 818 F.2d 19, 20 (8th Cir. 1987). When considering a motion for summary judgment, the court must scrutinize the evidence in the light most favorable to the non-moving party, according the non-moving party the benefit of every factual inference and resolving all doubts as to the facts or existence of any material fact against the moving party. *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 179-80 (W.D. Mo. 1985).

Recently, the Supreme Court has redefined the standards to be considered in ruling on summary judgment motions. Where, as in this case, the party moving for summary judgment does not bear the ultimate burden of persuasion at trial that party must make a prima facie showing "that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). This burden is met when the moving party identifies those portions of the record demonstrating an absence of a genuine issue of material fact. *Id.* at 323.

If the moving party meets this requirement, the burden shifts to the non-moving party who must produce sufficient evidence to manifest a dispute as to the material facts. To successfully meet this burden the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, the party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 474 U.S. 242, 248 (1986). Finally, "[i]n assessing whether a material fact is subject to a genuine dispute, a court should employ a standard essentially identical to that governing a motion for directed verdict under Rule 50(a)." *Id.* at 250. If a rational trier-of-fact, considering the record as a whole, could not find in favor of the non-moving party, then a trial is unnecessary. *Matsushita*, 475 U.S. at 586.

III. Analysis

Defendants attack plaintiffs' claim on two fronts. First, defendants contend that the five year statute of limitations for all of plaintiff DeBlase's claims arising out of investments made before 1986 (eight of the ten investments made by DeBlase) was triggered by notice of the alleged misrepresentation. Second, defendants

attack the allegation underlying all of plaintiffs' claims, arguing that no fraud or misrepresentation exists as a matter of law.[2/]

Defendants' contention that the statute of limitations for all of plaintiffs' claims begins with notice of the alleged misrepresentation is erroneous. The statute of limitations for the claims based on fraud in Counts I and V is triggered by discovery of fraud. Mo. Rev. Stat. § 516.120(5). The statute of limitations for plaintiffs' claims of breach of fiduciary duty and negligence, however, commences when damages are sustained. Mo. Rev. Stat. § 516.100.

A. Summary Judgment on Counts I and V

Plaintiffs' claims in Counts I and V sound in fraud. Count I alleges that DiSette made fraudulent representations. Count V alleges that defendants violated the Missouri Merchandising Practices Act.[3/] Because plaintiffs' claim for violation of the Merchandising Practices Act hinges on the allegations that DiSette made material and fraudulent misrepresentations to plaintiffs, Count V is also dependent on the existence of fraud or misrepresentation.

Both of defendants' arguments regarding the fraud claims in Counts I and V turn on the issue of notice. The answer to a single question will ultimately decide both prongs of defendants' motion regarding these claims: When were plaintiffs put on notice that the investments were not low-risk, stable investments but were volatile and speculative in nature?[4/] Defendants contend that the

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[2/] The primary allegation undergirding plaintiffs' claims is that the defendants, through DiSette, made material and fraudulent oral representations concerning the degree of risk and stability of the investments made by plaintiffs. All claims are inherently linked to this allegation. Therefore, defendants seek to invalidate all of plaintiffs' claims by challenging this primary allegation.

[3/] The Missouri Merchandising Practices Act prohibits "deception, fraud, false pretenses, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise." Mo. Rev. Stat. § 407.020.1.

[4/] The answer to this question will resolve the issues presented by both prongs of defendants' motion. The point in time that DeBlase was given notice of the true nature of the investments will mark the beginning of the statute of limitations

(continued...)

"offering materials"[5] provided to plaintiffs (prior to, or at the time of, investment) clearly and unequivocally gave plaintiffs notice that the investments were high risk and not stable. Plaintiffs argue that, at a minimum, there is a genuine dispute of fact concerning when they received notice of the investment's risks.

There is no dispute that plaintiffs signed subscription agreements contemporaneously with each investment. Defendants contend that these subscription agreements provided the critical notice to plaintiffs in two respects. First, in most cases the express terms of the agreements themselves stated that the investments were high risk.[6] Second, the subscription agreements, in one form or another, provided that plaintiffs had "received and read or reviewed" each PPM (detailing the high risk nature of the investments) accompanying the individual investments. The PPMs leave no doubt as to the high risk, speculative nature of the limited partnership investments.[7] Indeed, the PPMs often began with

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[4] (...continued)
period for fraud. Further, if notice of the high risk nature of the investments preceded, or was contemporaneous with, the investments, plaintiffs' fraud and misrepresentation claims must fail as a matter of law.

[5] Defendants define the "offering materials" as written disclosures provided to plaintiffs including an investor questionnaire, a subscription agreement and a private placement memorandum (a document similar to a prospectus, referred to hereafter as a "PPM").

[6] The following subscription agreements (attached as exhibits to Defendants' Suggestions in Support of the Motion for Summary Judgment) signed by DeBlase clearly indicated the high risk associated with the investments: Exhibit F-1, p. D-3 ¶ 4(k)(i); Exhibit F-2, p. D-3 ¶ 4(k)(i); Exhibit F-3, p. C-3 ¶ 4(k)(i); Exhibit F-4, p. D-3 ¶ 4(k)(i); Exhibit F-5, p. C-3 ¶ 5(l)(i); Exhibit F-7, p. E-2 ¶ 3(l)(i); Exhibit F-9, p. B-5 ¶¶ 4(j) & 4(l); and Exhibit F-10, p. IV-6 ¶¶ 8 & 20. Those signed by Cerra stating the risks involved are: Exhibit G-1, p. B-5 ¶¶ 4(j) & 4(l); Exhibit G-2, p. IV-6 ¶¶ 8 & 20; and Exhibit G-4, p. 3 ¶ 3(b).

[7] The PPMs associated with the DeBlase investments repeatedly indicated the high risk involved with these investments. *See* Exhibit F-1, pp. (ii) & 32; Exhibit F-2, pp. (ii) & 30; Exhibit F-3, p. (iii); Exhibit F-4, p. (ii); Exhibit F-5, pp. (iv-v) & 45; Exhibit F-6, pp. (i) & 19; Exhibit F-7, pp. (i) & 26; Exhibit F-8, pp. (i) & 27; Exhibit F-9, pp. v & 45; and Exhibit F-10, cover page and pp. (i) & 49. The PPMs associated with Cerra's investments also clearly stated the risks
(continued...)

capitalized, bold-faced warnings such as: **THE INVESTMENT INVOLVES A HIGH DEGREE OF RISK.** Further, throughout the text of the various PPMs the speculative nature of the investments was clearly and redundantly manifested.

To grant summary judgment in favor defendants, the court must ultimately find that the *only* conclusion that a rational trier-of-fact could reach is that plaintiffs had notice of the speculative nature of the investments prior to, or at the time of, investment (or in the case of DeBlase, beyond the statute of limitations). *See generally Matsushita*, 475 U.S. at 586. The linchpin of defendants' motion is the claim that the signed subscription agreements establish, as a matter of law, that plaintiffs invested money with full notice of the true nature of the investments. With full disclosure to plaintiffs of the risks involved in these investments, defendants argue that plaintiffs' claims of misrepresentation and fraud must fail as a matter of law. The court agrees and will grant the motion for summary judgment accordingly.

Plaintiffs' defense to the motion is that they signed the subscription agreements without reading the offering materials and that DiSette "went to great lengths to conceal material information from the plaintiffs." Plaintiffs' Suggestions in Opposition to the Motion for Summary Judgment, p. 15. That is, DiSette allegedly assured plaintiffs that they did not need to read the offering materials and thereby deceitfully deprived them of the knowledge contained in the written disclosures. "[B]oth plaintiffs have testified that they often time were not even given an opportunity to read the entire document, and [were] simply presented with a stack of documents with post-it notes indicating where they should sign. DeBlase even testified that there were occasions when the *only* page he received of the multi-page documents was the one which he was to sign." Plaintiffs' Suggestions in Opposition to the Motion for Summary Judgment, p. 14 (emphasis in original). The court rejected plaintiffs' argument.

2/ (...continued)
involved. *See* Exhibit G-1, pp. v & 45; Exhibit G-2, cover page and pp. (i) & 49; Exhibit G-3, pp. (i) & 27; Exhibit G-4, pp. (i) & 18; and Exhibit G-5, pp. (ii) & 48-49.

The subscription agreements and the PPMs unequivocally stated the inherent risk of the investments. Plaintiffs had full knowledge of the existence of all these documents (they signed the subscription agreements and the agreements clearly referenced the PPMs) and simply chose not to review them. There has been no evidence that DiSette refused to produce these documents upon request, prevented plaintiffs from examining these documents or otherwise concealed their existence. Instead, plaintiffs seem to infer that DiSette's alleged assurances that plaintiffs need not review these documents somehow prevented them from examining the documents. The court cannot agree. Knowing that these documents existed, plaintiffs made a conscious choice not to bother themselves with the specific information available to them. Rather, plaintiffs signed the subscription agreements without review and now claim that their reliance on the alleged oral assurances of DiSette should insulate them from the disclosures made in the agreements. This position is untenable.

"Under Missouri law, a person who has an opportunity to read a document but signs it without doing so is held to have knowledge of the document's contents, absent a showing of fraud." *United States of America for the use of Bussen Quarries, Inc. v. Thomas*, 938 F.2d 831, 833 (8th Cir. 1991). Plaintiffs have failed to make any showing that fraud prevented them from understanding what the subscription agreements clearly stated; specifically, that the investments carried a high risk and that plaintiffs had "received and read or reviewed" the PPMs. The *Bussen Quarries* presumption is not invalidated simply because some kind of alleged fraud exists in the action. Rather, this court understands *Bussen Quarries* to mean that the presumption is valid unless the alleged fraud either created a misapprehension as to the meaning or effect of the signed agreement, or induced plaintiffs to sign. The fraud alleged by plaintiffs does not affect the validity of the signed subscription agreements and therefore plaintiffs are deemed to have full knowledge of the subscription agreements and PPMs.[8/]

[8/] Plaintiffs seem to argue two related manifestations of the alleged fraud: (1) That plaintiffs should rely totally on DiSette without reading the offering materials; and (2) The original statements of DiSette concerning the low-risk nature and stability of the investments. The court finds that plaintiffs have not set forth

(continued...)

Further, this court finds the Eighth Circuit's decision in *Davidson v. Wilson*, 973 F.2d 1391 (8th Cir. 1992), dispositive of plaintiffs' argument. In *Davidson*, the court was faced with two investors suing the agent, and the securities company employing the agent, that sold them shares in a high risk limited partnership. *Id.* at 1392. The plaintiffs alleged fraud because the investments did not meet alleged oral representations made by defendants. *Id.* However, the plaintiffs received and signed subscription agreements prior to making the investments. *Id.* at 1399. These agreements made clear the risky nature of the investments and also referenced other documents disclosing the risks involved. *Id.* at 1396-1400.

The district court granted defendants' motion for summary judgment, holding that the plaintiffs "may not justifiably close their eyes to the written materials and rely only upon the oral statements, and that [plaintiffs] accordingly are charged with constructive knowledge of the written materials available to them." *Id.* at 1398. The Eighth Circuit affirmed, finding that:

> a sophisticated investor, confronted with a written document which contained repeated references to two other documents . . . and that also contained explicit disclaimers . . . did not justifiably rely upon any contradictory oral representations. There was ample reason for [plaintiffs] to take the position, that they would not move ahead and make investment payments until such references and representations were clarified to their satisfaction. Thus, we agree with the district court that, based upon the facts of this case, [plaintiffs'] claimed reliance upon [defendant's] oral representations was unjustifiable as a matter of law.

(...continued)
specific facts showing that DiSette represented that the investments were stable and low risk. However, even assuming that these representations did occur does not allow plaintiff to overcome the *Bussen Quarries* presumption. Fraud as to the speculative nature of the investments did not prevent DeBlase from understanding the content or effect of the subscription agreements, nor did it fraudulently induce plaintiffs to sign. Further, while DiSette's alleged assurances to plaintiffs may have been poor counsel, it does not rise to the level of fraud. Accordingly, the court finds that plaintiff have failed to show any possible fraud foreclosing the *Bussen Quarries* presumption.

Id. at 1401.

The factual and legal similarities between this action and *Davidson* compel an identical result. Admittedly, plaintiffs DeBlase and Cerra are not as financially sophisticated as the investors in *Davidson*, but neither are they unsophisticated.[9/] Plaintiff DeBlase is highly educated with significant experience in investing and financial matters. Deposition of Joseph DeBlase, pp. 33-34, 47, 48, 56, 64, 66, 68 & 72-73. Plaintiff Cerra has owned and operated two successful construction corporations for a number of years.[10/] Deposition of Ben Cerra, p. 10-13. Armed with a reasonable degree of business sophistication, plaintiffs were confronted with subscription agreements containing explicit disclaimers as to risk and/or referencing additional risk-disclosing documents. Plaintiffs made a knowing and intelligent waiver of their right to review these materials before investing and relied blindly on the alleged oral representations of DiSette. Given these facts, the court must find that plaintiffs' "claimed reliance upon [defendant's] oral representations was unjustifiable as a matter of law." *Id.* at 1401.[11/] Defendants' motion for summary judgment

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[9/] Plaintiffs have set forth considerable facts in an effort to establish their financial unsophistication. However, the significance of sophistication is muted by the patent and unequivocal risk disclosures in the subscription agreements and PPMs. The court finds that no great degree of sophistication was needed to be aware of the speculative nature of plaintiffs' investments.

[10/] Plaintiff Cerra also indicated on one subscription agreement that "I have such knowledge and experience in financial and business matters and in tax-oriented investments in particular that I am capable of evaluating the merits and risks of an investments in the securities." Defendants' Suggestions in Support of the Motion for Summary Judgment, Exhibit G-5, p. A-1-7.

[11/] The court in *Davidson* reviewed the plaintiffs' claim of justifiable reliance within the analytical framework set forth in *Zobrist v. Coal-X, Inc.*, 708 F.2d 1511 (10th Cir. 1983). In reviewing claims of justifiable reliance, the relevant factors are:

> (1) the sophistication and expertise of the plaintiff in financial and securities matters; (2) the existence of long standing business or personal relationships; (3) access to the relevant information; (4) the existence of a fiduciary relationship; (5) concealment of the fraud; (6) the opportunity to detect the fraud; (7) whether the plaintiff initiated

(continued...)

is granted as to Counts I and V.

B. Summary Judgment on Counts II through IV

Defendants' argument that the statute of limitations for the claims in Counts II through IV for breach of fiduciary duty and negligence is inaccurate. The statute of limitations for these claims commences when damages are sustained. Mo. Rev. Stat. § 516.100. Consequently, the court will not consider defendants' argument that the statute of limitations on Counts II through IV has run.

The court looks next at defendants' substantive argument for summary judgment on Counts II through IV. Defendants contend that the claims for breach of fiduciary duty and negligence are rooted in the allegations of fraud and misrepresentation and that because no fraud or misrepresentation occurred, summary judgment should be granted on these claims. While defendants have focused on the lack of fraud and misrepresentation they have not sufficiently discussed the issues specific to the claims for breach of fiduciary duty and negligence. The court is, thus, reluctant to grant summary judgment without further argument regarding these claims. Therefore, defendants' motion for summary judgment is denied for Counts II through IV.

11/ (...continued)

the stock transaction or sought to expedite the transaction; and (8) the generality or specificity of the misrepresentations.

Davidson, 973 F.2d at 1400 (quoting *Zobrist*, 708 F.2d at 1516). In addition to finding plaintiffs reasonably sophisticated in financial matters, this court finds the other factors weigh heavily in favor of granting the motion for summary judgment. Most significantly, the court finds that plaintiffs had full access to the relevant information (although they chose to ignore the materials); it cannot reasonably be found that DiSette concealed this information; and plaintiffs had every opportunity to detect the alleged fraud by simply reading the documents they signed and/or represented that they had reviewed.

In weighing all of the *Zobrist* factors applied in *Davidson*, this court finds that plaintiffs are not, as a matter of law, entitled to the protections of justifiable reliance.

Accordingly, it is ORDERED that:

(1) plaintiff's motion for reconsideration of this court's summary judgment Order of May 27, 1993 is GRANTED in part and DENIED in part pursuant to this Order;

(2) plaintiff's motion to file suggestions exceeding fifteen pages in support of the motion for reconsideration is GRANTED;

(3) defendants motion for summary judgment is GRANTED in part and DENIED in part pursuant to this order;

(4) this Order amends and supersedes this court's Order of May 27, 1993.

Fernando J. Gaitan, Jr.
United States District Judge

Dated: November 17, 1993
Kansas City, Missouri

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Dr. Joseph C. DeBlase et al.,	)	
Plaintiffs,	)	
vs.	)	No. 91-0642-CV-W-2
Cigna Individual Financial Services Company, et al.,	)	
Defendants.	)	

ORDER

On May 27, 1993, this court issued an order granting defendants' motion for summary judgment as to all counts of plaintiffs' complaint. On June 9, 1993, plaintiffs filed a motion for reconsideration of the May 27 Order. On November 17, 1993, the court, upon reconsideration, upheld the May 27 Order granting summary judgment as to Counts I and V, but denied summary judgment as to Counts II through IV for lack of specific arguments regarding these claims. The November 17 Order allowed defendants to renew their motion for summary judgment as to Counts II through IV by specifically addressing the claims. Defendants renewed their motion for summary judgment and, on March 29, 1994, this court issued an order granting summary judgment on the remaining claims. Pending before this court is plaintiffs' motion to reconsider the March 29 order.

Plaintiffs assert that this court's order was prepared without benefit of *The Jacobs Manufacturing Company v. Sam Brown Co.*, No 92-1834WM (8th Cir. March 28, 1994), the most

recent decision of the United States Court of Appeals for the Eighth Circuit regarding fraud. Plaintiffs allege that this court's order is inconsistent with *Jacobs*, and urge the court to reinstate all counts of their complaint.

In deciding *Jacobs*, the Eighth Circuit relied on two earlier decisions interpreting Missouri law, *Pinken v. Frank*, 704 F.2d 1019, 1024-26 (8th Cir. 1993) and *Essex v. Getty Oil Company*, 661 S.W.2d 544, 550 (Mo. App. 1983). This court has reviewed these cases, but finds them plainly distinguishable from the case at bar.

Jacobs involves a manufacturer (Jacobs) and its distributor (Brown). When Jacobs initially approached Brown about becoming a distributor, Brown read the written distributorship agreement, but expressed concern about certain terms limiting the relationship to a one-year period, and permitting Jacobs to sell directly to original equipment manufacturers (thus bypassing the distributor). Upon oral representations that the distributorship would last a "lifetime" if Brown performed well, and that Jacobs would refer all original equipment manufacturer inquiries in Brown's exclusive territory to Brown, Brown signed the agreement.

In *Pinken*, Frank was asked to execute promissory notes that were, by their terms, payable on a date certain. Frank was aware of the maturity date, but was induced to sign the notes by oral representations that the instruments would not be enforced unless certain conditions were met. *Pinken*, 704 F.2d at 1021-22. In *Essex*, a filling station owner was approached by an oil company to become a lease operator of a company filling station. During the course of negotiations, the owner expressed concern about certain terms in the lease permitting either party to terminate the lease agreement on 30-days written notice. Upon oral assurances that the language in the lease was merely a formality, and that the owner could remain in the location until he decided to retire, the owner signed the agreement. *Essex*, 661 S.W.2d at 547-48.

Jacobs, *Pinken*, and *Essex* involve situations in which a party had read or was otherwise aware of the written terms of an agreement, but was induced to sign the agreement by oral representations that the agreement would not be enforced as written. Thus, the issue decided by these cases is whether a party to a contract may "justifiably rely on the representation of the other

party that the written agreement will not be enforced according to its terms." *Pinken*, 704 F.2d at 1024. That is not the issue in this case. Plaintiffs were not persuaded to invest based on defendants' representations that the degree of risk, as described in the written materials, was less than stated in the written materials. Instead, plaintiffs invested without reading the very documents that would have alerted them to the degree of risk they were assuming. Neither *Jacobs*, nor any of the cases upon which *Jacobs* relies, provide a basis for relief under those circumstances.

Accordingly, it is ORDERED that plaintiff's motion to reconsider is DENIED.

Fernando J. Gaitan, Jr.
United States District Judge

Dated: April 21, 1994
Kansas City, Missouri

APPENDIX D

SUPREME COURT OF MISSOURI

en banc

March 29, 1995

Charles Cochran, et al.,	)	
	)	
Appellants,	)	
	)	
vs.	)	No. 76910
	)	Circuit Court No.
Daniel Christian Giddens,	)	616998
et al.,	)	
	)	
Respondents.		

ORDER

The Court having been advised by counsel for the parties that the above entitled cause has been fully settled and that the case has been dismissed by the Circuit Court of St. Louis County, the appeal herein is ordered dismissed as moot.

Day - to - Day

Ann K. Covington, Chief Justice

STATE OF MISSOURI-SCT.:

I, THOMAS F. SIMON, Clerk of the Supreme Court of Missouri, do hereby certify that the foregoing is a true copy of the order of said court, entered on the 29th day of March 1995, as fully as the same appears of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court. Done at office in the City of Jefferson, State aforesaid, this 24th day of April, 1995.

Thomas Simon, Clerk
Christina Simon, D.C.

APPENDIX E

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Missouri Constitution, Article V, section 10, provides:

> Cases pending in the court of appeals shall be transferred to the supreme court when any participating judge dissents from the majority opinion and certifies that he deems said opinion to be contrary to any previous decision of the supreme court or of the court of appeals. Cases pending in the court of appeals may be transferred to the supreme court by order of the majority of the judges of the participating district of the court of appeals, after opinion, or by order of the supreme court before or after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule. The supreme court may finally determine all causes coming to it from the court of appeals, whether by certification, transfer or certiorari, the same as an original appeal.

Missouri Supreme Court Rule 83.09 provides:

> DETERMINATION OF CASES FOLLOWING TRANSFER
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> Any case coming to this Court from a district of the Court of Appeals, whether by certification, transfer or certiorari, may be finally determined the same as an original appeal. If, however, in cases transferred on order of this Court, the Court concludes that the transfer was improvidently granted, the case may be retransferred to the Court of Appeals.